Supreme Court, U.S.
FILED
JUN 1 1999
CLERK

(2)

No. 98-1801

In The

Supreme Court of the United States

BOBBY WAYNE SWISHER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

MARK L. EARLEY
Attorney General of Virginia

*PAMELA A. RUMPZ
Assistant Attorney General

900 East Main Street
Richmond, Virginia 23219
(804) 786-4624

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

1488

QUESTION PRESENTED

Has petitioner failed to preserve his claim that his consent to search his jacket was unknowing and unintelligent?

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 1

REASONS FOR DENYING THE WRIT 5

SWISHER'S FACT-SPECIFIC CLAIM THAT HIS CONSENT TO SEARCH HIS JACKET WAS NOT KNOWING AND INTELLIGENT IS NOT PRESERVED FOR REVIEW 5

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

American Surety Co. v. Baldwin, 287 U.S. 156 (1932) 7

Forbes v. State Council, 216 U.S. 396 (1910) 7

Hanson v. Denckla, 357 U.S. 235 (1958) 7

Herndon v. Georgia, 295 U.S. 441 (1935) 7

Illinois v. Gates, 462 U.S. 213 (1983) 7

Kyles v. Whitley, 514 U.S. 419 (1995) 8

Radio Station WOW v. Johnson, 326 U.S. 120 (1945) 7

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 9

Simmerman v. Nebraska, 116 U.S. 54 (1885) 7

Swisher v. Commonwealth, 256 Va. 471, 506 S.E.2d 763 (1998) ..... *passim*

Texas v. Mead, 465 U.S. 1041 (1994) 8

Tiffany Fine Arts, Inc. v. United States, 469 U.S. 310 (1985) 8

Yee v. Escondido, 503 U.S. 519 (1992) 7

OTHER AUTHORITIES

§ 19.2-264.4, Code of Virginia 1

U.S. S. Ct. Rule 10 8

U.S. S. Ct. Rule 14.1(g)(i) 7

STATEMENT OF THE CASE

On October 29, 1997, a jury in the Circuit Court for Augusta County, Virginia, convicted the petitioner, Bobby Wayne Swisher, of capital murder, abduction with the intent to defile, rape and forcible sodomy. The jury fixed Swisher's punishment at life for each of the non-capital convictions. The jury also sentenced Swisher to death on the capital murder conviction, finding that he represented a continuing serious threat to society and that his offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to the victim. *See* Va. Code § 19.2-264.4. In a separate sentencing hearing held February 18, 1998, the trial judge imposed sentence in accordance with the jury's verdicts.

On November 6, 1998, the Supreme Court of Virginia affirmed Swisher's conviction and death sentence. *Swisher v. Commonwealth*, 256 Va. 471, 506 S.E.2d 763 (1998).

STATEMENT OF FACTS

The Virginia Supreme Court summarized the facts surrounding Swisher's offense as follows:

> On February 5, 1997, Dawn McNees Snyder disappeared from a florist shop where she worked in Stuarts Draft in Augusta County. Her body was found on February 21, 1997, near a riverbank about two miles from the florist shop. Animals had eaten extensive portions of her face,

neck and upper chest, and her identity was established by use of her dental records.

On February 22, 1997, the defendant, age 20, was at an apartment with two friends, one of whom was Clarence Henry Ridgeway, Jr. Swisher told Ridgeway that Swisher had abducted, raped, sodomized, and killed Snyder. Swisher stated: "You know the woman, Dawn Snyder . . . I killed her." Swisher related the following details to Ridgeway.

On February 5, 1997, about 7:15 p.m., Swisher's uncle drove Swisher by car to a grocery store located near the florist shop where Snyder worked. Swisher left the grocery store and walked to the florist shop. Swisher entered the shop, approached Snyder, and said, "I have a gun in my pocket." Swisher showed Snyder a "butcher knife with ridges" and directed her to go with him.

Swisher forced Snyder to leave the florist shop through a rear door, and they walked for some distance until they reached a field by the South River. Then, Swisher stopped Snyder and told her to "suck his dick." He forced her to perform an act of oral sodomy upon him, and he made her remove her clothes. After he raped her, she put her clothes on, and he forced her to perform another act of oral sodomy upon him.

Swisher decided to kill Snyder because she had "seen his face." He "pulled out the butcher knife" that had "ridges around the edge of the blade," and he "slit her across the left side of the face and was holding her; then slit her throat and then gouged her and then tossed her into a river." He walked along the riverbank, watching her in the river, asking her, "[a]re – are you dead

yet?" After Snyder floated in the river for awhile, Swisher saw her "crawl up the bank." Then, "he got scared and took off running straight to his house from that field." Swisher threw his knife in the river.

When Swisher finished his confession to Ridgeway, Swisher stated that "[i]t feels like [I] could do it again." The following morning, Ridgeway informed the Augusta County Sheriff's Office of Swisher's crimes.

On February 23, 1997, Sergeant William E. Lemerise, Sergeant K.W. Reed, and two other deputies went to a house where Swisher resided with his uncles, Paul H. Swisher and William E. Swisher. Sergeant Reed advised Bobby Swisher that he was a suspect in the murder of Dawn Snyder and asked if Swisher would accompany the deputies to the Sheriff's Office for questioning. Swisher, who did not object, accompanied the deputies. Sergeant Lemerise informed Swisher that he would be required to wear handcuffs while en route to the Sheriff's Office because of a departmental policy which required that the sheriff's personnel transport suspects in restraints for safety considerations. Lemerise told Swisher that he would have to wear these restraints even though he was not under arrest.

When Swisher arrived at the Sheriff's Office, about 10:15 p.m., the handcuffs were immediately removed from him, and he was taken to a "briefing room." The briefing room is an open room with a coffee machine and a drink machine. There are no bars on the windows or door locks in that room. Swisher was permitted to smoke cigarettes, and he was given coffee.

Sergeant Lemerise explained to Swisher that he was not under arrest, that he was a suspect, that the sheriff's personnel were going to ask him some questions, and that he was free to leave. Lemerise asked Swisher "how did he feel about the fact that he could walk out of there if he chose to, words to that effect . . . and [Swisher] appeared at the point in time, although he was nervous . . . to be fine with the situation."

Swisher spoke with the deputies, but did not confess to the commission of any crimes until after he was arrested and twice read his Miranda rights after midnight on February 24. Swisher admitted, in an audiotaped confession, that he had sodomized, raped and murdered Snyder by cutting her throat. He also stated that after he cut her throat, he threw her into the South River.

Dr. David Oxley, a medical examiner who performed an autopsy on Snyder's body, was unable to render an opinion about the specific cause of Snyder's death. He did state, however, that it was in inescapable conclusion that Snyder's death was the result of violent causes "probably related to the neck." Dr. Oxley was not able to determine positively whether the victim's throat had been cut because animals had eaten her larynx, trachea, and the large arteries and veins that were in her neck. The highest concentration of blood on the victim's clothing appeared on a shirt around the neck area extending onto the chest area.

Patricia Taylor, a forensic scientist in the Forensic Biology Unit of the Western Regional Laboratory for the Commonwealth of Virginia,

qualified as an expert witness on the subject of forensic DNA (deoxyribonucleic acid). She examined some panties that were found on Snyder's body. Her examination revealed that DNA consistent with Swisher's DNA was found in the semen deposited on Snyder's panties. Taylor testified that the odds of the DNA found on Snyder's panties belonging to someone other than Swisher were one in 380,000,000 in the Caucasian population.

Spots of blood were found on Swisher's coat. Taylor testified that the DNA profile obtained from that coat is consistent with the DNA profile of Snyder and different from the DNA profile of Swisher. Taylor testified that the probability of randomly selecting an individual unrelated to Snyder who had a DNA profile consistent with the DNA on Swisher's coat was approximately one in 1.3 billion in the Caucasian population. Dr. Taylor testified that the DNA profile obtained from spermatozoa heads extracted from the victim's stomach and esophagus were consistent with Swisher's DNA profile.

Swisher, 256 Va. at 475-478, 506 S.E.2d at 765-76.

REASONS FOR DENYING THE WRIT

SWISHER'S FACT-SPECIFIC CLAIM THAT HIS CONSENT TO SEARCH HIS JACKET WAS NOT KNOWING AND INTELLIGENT IS NOT PRESERVED FOR REVIEW.

Prior to trial, Swisher moved to suppress all "property seized as a result of [his] arrest." (JA 132). Included

in this motion was a request to suppress evidence obtained as a result of a luminol test performed on the jacket Swisher wore when he voluntarily accompanied sheriff's deputies to the department for questioning. In his written motion and at the hearing on the motion, Swisher asserted that the physical evidence, including the jacket, ought to be suppressed either because it had been obtained without a warrant or because it had been obtained as a result of his alleged illegal arrest. (JA 132-135). After hearing testimony on the matter, the trial court ruled that the search of the jacket was consensual and refused to suppress the jacket. (JA 532).

On direct appeal, Swisher never challenged the trial court's ruling that he had consented to the luminol testing of the jacket. Rather, Swisher reasserted that the jacket was obtained and searched improperly because he allegedly had been arrested illegally. The Virginia Supreme Court, not having been presented with a question of whether Swisher's consent was "voluntary," never decided that issue. The Court, however, in ruling that the search conducted by the police was constitutional, found that Swisher was not "in custody" at the time of the testing and reiterated the trial court's uncontested finding that Swisher had consented to the luminol testing of his jacket. *Swisher*, 256 Va. at 482-483, 506 S.E.2d at 769-770 (noting that before Swisher was arrested at 12:05 a.m., Swisher was "free to leave the Sheriff's Office" and that the record evidence "supports the trial court's finding that . . . Swisher's consent was voluntary"). Nevertheless, Swisher asserts certiorari is warranted to address the consent search of his jacket and whether "consent to search can be voluntary when such consent is given by an

individual in custody at a police station, who has not given a knowing and intelligent waiver of his Fourth Amendment rights." (Petition at 6)

A. Not raised below

In the court below, Swisher never challenged the trial court's ruling that he voluntarily consented to the testing of his jacket. He certainly never alleged that his consent was unknowing and unintelligent because he allegedly was "in custody" at the time of the consent. Because the claim was not raised in the Court below, certiorari is not warranted. *Yee v. Escondido*, 503 U.S. 519, 533 (1992); *Illinois v. Gates*, 462 U.S. 213, 218-220 (1983); Rule 14.1(g)(i).[1]

B. Factual question

The state courts' fact-specific determinations that "Swisher gave [police] consent to test his jacket," *Swisher*, 256 Va. at 483, 506 S.E.2d at 769, clearly do not warrant a

---

[1] Swisher may argue that he preserved a challenge to the voluntariness of his consent in a petition for rehearing. He clearly did not. Swisher's petition for rehearing challenged his consent on **Fifth Amendment** grounds, not on the Fourth Amendment grounds he alleges here. In any event, raising the federal question for the first time in a petition for rehearing is insufficient unless the court actually entertains the petition and expressly decides the question. *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945); *Hanson v. Denckla*, 357 U.S. 235, 243-44 (1958); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935); *American Surety Co. v. Baldwin*, 287 U.S. 156 (1932); *Forbes v. State Council*, 216 U.S. 396 (1910); *Simmerman v. Nebraska*, 116 U.S. 54 (1885). The Virginia Supreme Court summarily denied Swisher's petition for rehearing.

grant of certiorari. *See* U.S.S.Ct. Rule 10 (certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). *See also Kyles v. Whitley*, 514 U.S. 419, 460 (1995) (Scalia, J., dissenting) ("an intensively fact-specific case in which the Court below unquestionably applied the correct rule and did not unquestionably err [is] precisely the type of case in which we are ***most*** inclined to deny certiorari") (emphasis in original); *Texas v. Mead*, 465 U.S. 1041 (1994) (Stevens, J.) (court does not review cases which primarily present questions of fact). This Court, moreover, should not grant certiorari to redecide the factual findings of the two lower courts. *See Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 318 n.5 (1985) (factual findings made by the trial court and upheld by the appellate court should not be reviewed under the "two court" rule).

C. No merit

Contrary to Swisher's repeated assertions, he simply was not "in custody" at the time he voluntarily consented to having his jacket tested. The Virginia Supreme Court found that before Swisher was arrested at 12:05 a.m. on February 24, 1997, Sheriff's deputies "informed [Swisher] he was free to leave the Sheriff's Office." *Swisher*, 256 Va. at 482, 506 S.E.2d at 769. Thus, Swisher's case does not even present the question he would have this Court decide: under what circumstances a person ***in custody*** knowingly and intelligently consents to a search. And, although Swisher never challenged on direct appeal the trial judge's finding that he consented to a search of his jacket, Swisher's position in the trial court was that he

never consented to a search, not that his consent somehow was unknowing or unintelligent. (JA 495).

In any event, it is clear that Swisher knowingly and intelligently consented to having his jacket tested. In fact, the trial judge specifically credited, and the Virginia Supreme Court cited, the testimony of Sergeant William Lemerise in this regard. Lemerise testified that he explained the purpose of the luminol test to Swisher (JA 456), and then asked Swisher whether deputies could test his jacket. Swisher replied, "that's all right with me, because I don't know nothing about what you're talking about." *Swisher*, 256 Va. at 483, 506 S.E.2d at 769. In addition, after the luminol test showed that blood was present on the jacket, Sergeant Lemerise "explained to Swisher that the test was positive." (JA 456). Lemerise then "asked Swisher for permission to send the jacket to a forensic laboratory for further testing and Swisher agreed." *Swisher*, 256 Va. at 483, 506 S.E.2d at 769.

Whether a consent to search was voluntary "is a question of fact to be determined from the totality of all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). Given the fact that Swisher was not in custody at the time he consented to the search of his jacket, that he specifically had been told he was free to leave, and that the purpose of the luminol testing was fully and carefully explained to Swisher before he consented to the testing, there is no basis for reviewing the trial court's determination that his consent was voluntary.

D. Harmless error

Swisher's argument presents no compelling reason to grant certiorari because it was not properly preserved and it involves only an intensely fact-specific application of well-established Fourth Amendment law to the particular facts of Swisher's case. Even if an error had occurred, however, it unquestionably would have been harmless. The independent evidence overwhelmingly proved that Swisher committed a capital murder. He fully confessed to a friend (JA 1005-1010), he confessed again to the police (JA 173-175, 181), and Swisher's sperm was found on the victim's panties. (JA 1070). In addition, sperm found in the victim's rectum, vagina, esophagus and stomach was determined to be "consistent with a mixture of the DNA profiles of Swisher and Snyder." (JA 1067, 1068).

In view of the independent evidence against Swisher, it is clear that his guilt was established overwhelmingly and that his alleged error clearly would be harmless. Certiorari, therefore, is not warranted.

CONCLUSION

Swisher has not presented any "compelling" reasons which warrant certiorari review of his claim. This Court should deny the petition for writ of certiorari.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,
Respondent herein.

MARK L. EARLEY
Attorney General

PAMELA A. RUMPZ
Assistant Attorney General
Office of the Attorney General
900 East Main STreet
Richmond, Virginia 23219
(804) 786-4624